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08-1412

No. 08-[redacted]

FILED
JUL 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STEVEN J. THOROGOOD, on behalf of himself and all others similarly situated,
Petitioner,

v.

SEARS, ROEBUCK AND CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected class certification of a putative class action alleging consumer fraud under the laws of 29 states because of the presence of individualized issues precluding class treatment, including those related to whether particular class members relied on the alleged misrepresentations.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Sears, Roebuck and Co. states that its parent company is Sears Holding Corporation, which owns 100% of Respondent's stock.

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OPINIONS BELOW

The court of appeals' opinion reversing the district court's certification of the class is reported at 547 F.3d 742 (7th Cir. 2008). Pet.App. 16a-28a. The district court's certification order is not reported, but may be accessed at 2007 U.S. Dist. LEXIS 81035 (N.D. Ill. Nov. 1, 2007). Pet.App. 1a-9a.

COUNTERSTATEMENT OF THE CASE

Respondent Sears, Roebuck and Co. ("Sears") has exclusively sold laundry appliances under the Kenmore name for more than 80 years. SA 147-48.[1] Kenmore laundry appliances are designed and manufactured by Whirlpool and Electrolux Home Products. SA 148.

A. Varying Features Offered with Kenmore Dryers

Sears' dryers are equipped with different combinations of features depending on customers' diverse preferences. Many factors influence which features are included with any given dryer model. *Id.*

Consumers typically purchase washers and dryers as a set. *Id.* Numerous variables affect the particular washer and dryer set that a consumer chooses to buy. Integrating laundry products into

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[1] References to "SA" are to the "Separate Appendix of Defendant-Appellant" filed on April 21, 2008 in the court of appeals.

household décor, aesthetics, noise reduction, and space requirements are increasingly important considerations for consumers. SA 149. Dryers have a combination of features (including heat or moisture sensors, larger capacity, and automatic features), and combined features vary from dryer to dryer. SA 148. Customers may prefer dryers that have more settings, have automatic settings, save space, or offer larger capacities. SA 149.

B. Petitioner's Dryer

In November 2001, petitioner Steven J. Thorogood purchased his Kenmore (Model No. 417.8114200) from a Sears store in Tennessee, as part of a washer-dryer set. Pet. App. 6a. Although the petition extensively discusses Sears' online advertising (*e.g.*, Pet. 10), petitioner Thorogood conducted no research and viewed no Sears advertisements prior to buying his dryer. SA 164-65. He also did not see any internet materials or manuals relating to his dryer in advance of his purchase. *Id.* His only research was conducted on the floor of the store that day, and it was there that Thorogood decided to purchase the washer and dryer. *Id.* Indeed, the set Thorogood purchased was the first that he came upon in the store. SA 165.

At the store, Thorogood saw no signs, ads, catalogues, or other marketing materials stating that the dryer's drum was 100% stainless steel. SA 199. The dryer's console contains the words "stainless steel" and Thorogood alleges that a display card at the Tennessee store said "stainless steel." SA 165-66. Thorogood further testified that he has no

evidence that Sears ever expressly stated that the drum was 100% stainless steel and no evidence that Sears intended to deceive consumers into believing that the drums were 100% stainless steel. SA 186, 199. Thorogood also testified that he has no basis to believe that "consumers understand the word stainless steel to mean 100% stainless steel." SA 222.

Although Thorogood implies that stainless steel is used only for its rust resistance (Pet. 6), in fact, drums containing stainless steel also offer customers more even heating, a snag-free surface, and a sleek look. SA 149. Drums containing stainless steel also resist staining from clothing dyes that may re-release into subsequent loads and cause dingier whites. *Id.* In short, stainless steel dryer drums provide many benefits separate and apart from improved rust resistance. *Id.*

Thorogood's family used the dryer daily for four years and during that period it performed flawlessly. SA 37, 174. Thorogood alleges that in November 2005—some four years after the purchase—he discovered that the epoxy coating on the mild steel flange had been worn away by the Teflon and felt pads of the suspension system, and, as a result, had begun to rust. SA 181. He knows no other purchasers who experienced similar problems with their dryers, notwithstanding his attempts to find other dissatisfied purchasers. SA 185, 200-01.

C. Procedural History

Petitioner filed a putative class action alleging that Sears' description of his Kenmore clothes dryer as "stainless steel" violated the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §47-18-101. Thorogood ultimately sought class certification based on the consumer fraud laws of 29 states whose law he claimed provided principles suitable for class adjudication. Sep.Apx 138-45, 151-55.

At bottom, petitioner's claim is that it was fraudulent for Sears to describe the dryer's drum as stainless steel when, in addition to the stainless steel contained in the rest of the drum, the front flange of the drum in Thorogood's dryer is constructed out of ceramic-coated mild steel. Pet. 2a. According to Thorogood, this front flange, in turn, is susceptible to rust, which could damage clothing dried in the dryer. *Id.* His charge of fraud, therefore, depended on the multiple inferences that Sears' statement that the drums in the dryers at issue were "stainless steel" necessarily meant "100% stainless steel," and that "100% stainless steel," in turn, necessarily meant "rust-free for the life of the machine" and "will never cause rust damage to clothes." *Cf.* Pet.App. 24a (summarizing inferences made by petitioner).

There is no evidence that Sears ever made any of the representations that petitioner sought to infer from the statement that his dryer was "stainless steel." Thorogood certainly did not show that Sears made any uniform statements in advertisements in the 29 states at issue that its dryers were "100%" or "fully" stainless steel, or "would always be rust free."

The district court nevertheless granted petitioner's motion for certification of a class of consumers who reside in 29 states having consumer protection statutes "that provide a private cause of action for unfair and deceptive practices that cause an ascertainable loss[.]" Pet.App. 2a. *See also* Pet.App. 8a (listing 29 putative class jurisdictions). With respect to common questions of fact, the district court accepted petitioner's argument "that the class was subject to the same false representation that the dryer contained a drum that was made of stainless steel rather than a combination of stainless steel and corrodible mild steel" and concluded that, as a matter of law, "where there is uniformity of or standard written representations the court can *presume* individual reliance." Pet.App. 2a, 4a (emphasis added). The district court also determined that the "ascertainable losses" of all class members would be the "premium" that they paid for the dryer, "if any." Pet.App. 7a.

Sears sought interlocutory review of the certification order by the court of appeals pursuant to Fed. R. Civ. P. 23(f). On October 28, 2008, the Seventh Circuit unanimously reversed the district court's certification order. The court of appeals observed that petitioner's allegations were "notably weak for class treatment." Pet.App. 23a. The court determined that certification was improper because there was no evidence regarding whether other class members shared Thorogood's professed understanding of the import of Sears' statements and thus, on this record, class-wide reliance was "implausible." Pet.App. 26a. In view of the

inferences that Thorogood sought to draw from Sears' statements about stainless steel in its dryers, the court of appeals also held that individualized hearings as to each class member's understanding of Sears' alleged misrepresentations would be required. *Id.*[2]

REASONS FOR DENYING THE PETITION

The decision below presents no issue warranting review by this Court. The Seventh Circuit applied settled principles of law to the facts of this case, and reached a correct result that does not conflict with any decision of this Court or any other federal appellate court.

There is no merit to petitioner's contention that there is a conflict among the lower federal appellate courts with respect to the appropriate standard under Fed. R. Civ. P. 23(b) for assessing predominance in class action cases alleging consumer fraud. The question as to which Thorogood posits a conflict is whether an "objective" test permitting reliance to be presumed or a "subjective"

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[2] Following the Seventh Circuit's decertification of the class, the case proceeded in the district court on Thorogood's individual claim. On July 1, 2009, the district court granted Sears' motion to dismiss Thorogood's action on the ground that Sears' $20,000 offer of judgment mooted his individual claim and divested the court of subject matter jurisdiction because this offer exceeded the total amount of damages, inclusive of attorneys' fees and costs, to which Thorogood was entitled pursuant to the TCPA. *See* District Court Order, Docket Entry # 136 (N.D. Ill. July 1, 2009). On July 13, 2009, Thorogood moved for reconsideration of this ruling. *See* Motion of Plaintiff Steven J Thorogood for Reconsideration Regarding Terminate Hearings, Docket Entry # 137 (filed July 13, 2009).

test requiring proof of each class member's reliance on the alleged misrepresentations should be applied to the consumer fraud claims he purports to assert on behalf of class members in 29 states. The answer to that question turns not upon any question of federal law, but upon the substantive elements for establishing a consumer fraud claim under the laws of these 29 states, which must be considered to determine whether common issues predominate over individual ones.

The federal cases that petitioner cites provide no support for his contentions that there is any conflict of federal law regarding whether an "objective" or "subjective" standard for proving reliance applies in consumer fraud cases. The cases on which Thorogood principally relies involve federally regulated securities and claims asserted under federal securities law. Those cases are, accordingly, irrelevant to the state law issues raised by the petition. Indeed, courts have repeatedly held that the fraud-on-the market theory utilized in federal securities cases has no application to the consumer fraud claims at issue here.

Certification of the instant case as a class action also was inappropriate in light of the numerous material variations among the laws of the 29 jurisdictions that Thorogood sought to invoke. Far from supporting any uniform standard as to a presumption of reliance, the applicable state laws impose varying requirements for proving reliance and the other elements for establishing liability. These differing standards preclude classwide adjudication of petitioner's consumer fraud claims.

Such additional infirmities render the Seventh Circuit's decision particularly unsuited for review by this Court.

I. THE PETITION RAISES QUESTIONS THAT TURN EXCLUSIVELY ON STATE LAW AND DO NOT WARRANT THIS COURT'S REVIEW

Certiorari should be denied because—at the core of the petition—the conflict it posits presents no question of federal law at all. State law, and not federal law, determines what elements, including reliance, must be satisfied to prove fraud in the 29 jurisdictions as to which Thorogood sought a class adjudication. The elements for proving fraud under the laws of these 29 jurisdictions, in turn, control assessment of whether the claims are suitable for class treatment under Fed. R. Civ. P. 23.

This Court definitively resolved the matter more than three decades ago in rejecting application of a single or "uniform" law in multi-state class actions. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985), the Court held that due process requires the law of each applicable state law to be given effect. *Accord Georgine Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). Moreover, it is well-accepted that, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the substantive state law of fraud is applicable when (as here) federal jurisdiction is predicated upon diversity of citizenship. *See, e.g., Hanson v. Ford Motor Co.*, 278 F.2d 586, 590 (8th Cir. 1960) (Blackmun, J.); *see also Rodi v. S. N.E. Sch. of Law*, 389 F.3d 5, 13 (1st

Cir. 2004); *Christopher's Ariz. Transp. Serv. v. Duncan*, 2000 U.S. App. LEXIS 15644, at *9 (4th Cir. July 6, 2000); *Holm v. Shilensky*, 388 F.2d 54, 56 n.2 (2d Cir. 1968).

Petitioner highlights the fallacy of his contention of an "irreconcilable conflict" in federal precedent as to the test for reliance in consumer fraud cases (Pet. 27) by relying heavily on a California Supreme Court decision, *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971).[3] California was among the group of 29 jurisdictions whose consumer fraud laws Thorogood sought to invoke in seeking class certification in the district court. Pet.App. 8a. State court authority addressing the standards for proving fraud under state law plainly does not establish a conflict among the federal appellate circuits as to any question of federal law that could support certiorari under Supreme Court Rule 10.[4]

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[3] It also is questionable whether, even as a matter of California precedent, *Vasquez* remains good law for the proposition for which it is cited. The portion of *Vasquez* cited in the petition was effectively overruled by California's voters. In 2004, California passed Proposition 64, which reinstates the reliance requirement in consumer actions under California law. *See, e.g., Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 437-38 n.6 (C.D. Cal. 2007) (inferring reliance in consumer actions "may no longer be good law in California"); *see also* Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 37 (2006) ("Proposition 64 effectively forecloses suits by private plaintiffs who have not suffered a loss in reliance on a manufacturer's misrepresentation").

[4] For the same reason, petitioner's reliance on the *Second Restatement of Torts* section addressing state law fraud

Because the complaint brought an action under the TCPA, and sought certification based on the consumer fraud laws of 29 separate jurisdictions, any "presumption of reliance" would necessarily require the application of substantive state law. Accordingly, the court of appeals' refusal to presume reliance on a classwide basis in this case does not implicate any issue of federal law.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO ANY QUESTION OF FEDERAL LAW.

A. The Fraud-on-the-Market Theory Utilized for Federal Securities Violations Has No Application in State Law Consumer Fraud Class Actions.

There is no merit to petitioner's assertion of any conflict on a question of federal law. In particular, there is no merit to his contention that the First and Ninth Circuits constitute a "majority" of federal circuits that presume reliance in consumer fraud cases. Pet. 26.[5] *In re Xcelera.com Sec. Litig.*,

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standards (Pet. 28) is similarly misplaced and cannot support the existence of a conflict as to any issue of federal law.

[5] In his statement of the question presented, Thorogood indicates that the Ninth and Tenth Circuits, rather than the First and Ninth Circuits, employ the so-called "objective" test. *See* Pet. i. But the text of the petition cites no Tenth Circuit decision on this point. *See id.* at 26-31. Moreover, petitioner's suggestion that the cases he cites from the First and Ninth Circuits (Pet. 26) represent the "majority" approach of employing an "objective" test for assessing reliance is

430 F.3d 503 (1st Cir. 2005), the only First Circuit case cited (Pet. 29), involved a claim alleging securities fraud under federal law. That case has no bearing on the elements required to establish consumer fraud under the laws of the 29 states invoked by petitioner. The Ninth Circuit case, *U.S. Bank Nat. Ass'n v. Sterne, Agee & Leach, Inc.*, 281 Fed. Appx. 740 (9th Cir. June 6, 2008), which Thorogood cites (Pet. 29), is irrelevant for the same reason.[6]

Federal securities fraud claims also have no relevance here because they are governed by unique rules having no application to the state law consumer fraud claims. In federal securities fraud

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contradicted later in the petition when Thorogood cites decisions from *four* Circuits (the Second, Fifth, and Eleventh, along with the Seventh Circuit's decision below) as employing the "*subjective*" test for establishing reliance in such cases. *See id.* at 30-35.

[6] Petitioner's reliance (Pet. 29) on both *U.S. Bank Nat. Ass'n* and *Jenson v. Fiserve Trust Co.*, 256 Fed. App. 924 (9th Cir. Nov. 26, 2007), also is misplaced because these decisions are unpublished. These cases involved alleged misrepresentations about financial investments and not consumer goods, and are not inconsistent with the cases establishing that reliance cannot be presumed in cases alleging fraud in connection with the sale of consumer goods. Even if they were actually inconsistent with other case law, however, these unpublished cases lack precedential value in the Ninth Circuit. *See* 9th Cir. R. 36-3(a); *Hart v. Massanari*, 266 F.3d 1155, 1160 n.2 (9th Cir. 2001) (courts are free to "disregard earlier rulings that are designated as nonprecedential"). Accordingly, these cases, which do not bind even the Ninth Circuit, could not present a square conflict supporting review by this Court even if they actually did conflict with case law from other circuits.

cases, courts employ the fraud-on-the-market theory, which presupposes that "most publicly available information is reflected in the market price," and that any alleged misstatement about a stock will be reflected in that stock's price. *Basic, Inc. v. Levinson*, 485 U.S. 224, 244 (1988) ("In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value") (citation omitted). Recognizing that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," courts applying this theory have concluded that an investor's reliance on any public material misstatements about a regulated security may properly be presumed in cases alleging federal securities fraud even if the investor in question was not actually aware of such misstatements. *See id.* at 247.[7]

In contrast, federal courts repeatedly have refused to presume reliance in the consumer fraud context because the consumer goods market is not a perfect market supporting a presumption that particular misrepresentations necessarily would have affected that consumer's decision to buy a

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[7] *See also Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1198-1200 (N.J. 2000) (refusing to apply fraud-on-the-market theory to allow a presumption of reliance under New Jersey law, but providing a detailed discussion of the efficient-capital-market hypothesis, which presumes that a stock price incorporates all publicly available information about a stock's value).

certain product if he or she had known more, or more accurate, information at the time of purchase.[8] Unlike purchasers of securities, who can be presumed to have purchased a stock based on its market value, and to have relied on any material misrepresentation serving to artificially inflate the

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[8] *See, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008) ("we cannot assume that, regardless of whether individual smokers were aware of defendants' misrepresentation, the market at large internalized the misrepresentation to such an extent that all plaintiffs can be said to have relied on it"), *overruled in part on other grounds, Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Gunnells v. HealthPlan Servs., Inc.*, 348 F.3d 417, 434-37 (4th Cir. 2003) (rejecting "fraud on the market" presumption of reliance in consumer fraud class action); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363 (11th Cir. 2002) ("The securities market presents a wholly different context than a consumer fraud case"), *overruled in part on other grounds, Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (affirming denial of certification in consumer fraud class action due to individualized reliance inquiries); *Gartin*, 245 F.R.D. at 438 ("unlike such securities fraud class actions, reliance is not presumed for common-law fraud claims"); *Heindel v. Pfizer Inc.*, 381 F. Supp. 2d 364, 380 (D.N.J. 2004) ("the fraud on the market theory is flawed with respect to Plaintiff's consumer fraud claims"); *Coleman v. Danek Med., Inc.*, 43 F. Supp. 2d 629, 635 n.4 (S.D. Miss. 1998) (noting that "no court has ever adopted a 'fraud on the market' type theory outside the securities fraud context," citing authorities); *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 17031, at *21-22 (E.D. Pa. Dec. 12, 1990) (denying certification in consumer fraud class action when plaintiff's theory "requires each class member to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed enrolled in reliance of those advertisements. There are no short-cuts")(footnote omitted).

price of that stock, myriad considerations in addition to price may affect an individual purchaser's decision to buy a particular consumer good. Advertisements about such goods, in turn, convey different messages to different people, thus necessitating individual inquiries as to whether the consumer relied upon the advertisement in deciding to make the purchase. *See supra* pages 13 note 8 (collecting cases).

Indeed, the Ninth Circuit (on whose decisions Thorogood heavily relies in an effort to establish a conflict) has rejected application of any presumption of reliance when numerous factors unrelated to the alleged misrepresentations could have motivated the individual class members' decisions to utilize the product. *See Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (finding no "single logical explanation" for an individual's decision to use defendants' slot machines; "it may be an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things").[9]

Far from establishing the existence of any conflict, the Second, Fifth and Eleventh Circuit cases that petitioner criticizes apply the same principles that repeatedly have led courts to reject application of any presumption of reliance in consumer fraud cases. *See, e.g., McLaughlin*, 522 F.3d at 225 (rejecting presumption of reliance on the claimed misrepresentations about the relative safety of light

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[9] The Ninth Circuit also has refused to presume reliance in other contexts in which no efficient market existed. *See Binder v. Gillespie*, 184 F.3d 1059, 1063-65 (9th Cir. 1999).

cigarettes because "each plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool'"); *Sikes*, 281 F.3d at 1364 ("[E]ach individual plaintiff is the only person with information about the content of the advertisement upon which he relied."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (fraud class action could not be certified because proof of individual class members' reliance on the alleged misstatements was required).

The Seventh Circuit was guided by these same considerations in concluding that there was no basis to presume that every putative class member relied on Sears' "stainless steel" advertisements, which Thorogood himself admitted he did not see (SA 164-65), in determining to purchase a Kenmore dryer. *See* Pet.App. 25a-26a ("Advertisements for clothes dryers advertise a host of features that might matter to consumers, such as price, size, electrical usage, appearance, speed, and controls, but not, as far as anyone in this litigation has suggested except the plaintiff, avoidance of clothing stains due to rust").[10] This correct decision poses no conflict on any

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[10] Petitioner selectively quotes one sentence from the Rules Advisory Notes to Rule 23 (Pet. 27 n.6), while omitting the very next sentence, which states: "On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made *or in the kinds or degrees of reliance by the persons to whom they were addressed*." (Emphasis added.) As the Seventh Circuit correctly recognized, the instant case exemplifies just such issues of varying reliance.

question of federal law and presents no issue warranting this Court's review.

B. The Purported "Uniformity" of the Claimed Misrepresentations Does Not Support Any Presumption of Reliance.

There is equally no merit to petitioner's contention (Pet. 29, 31) that the presumption of reliance is appropriate based on the supposed "uniformity" of Sears' alleged misrepresentations. Petitioner vastly overstates the holding of *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007) in claiming that the Ninth Circuit applied "[a] presumption of reliance 'based upon uniform disclosures.'" Pet. 29. *Lozano* considered whether defendant's alleged illegal billing practices with respect to free "anytime" call minutes it had promised to provide its cell phone customers violated California law (504 F.3d at 722), and, in fact, is entirely consistent with the numerous federal cases discussed above that refused to certify class actions alleging state law consumer fraud claims. Indeed, the petition neglects to apprise this Court that *Lozano* affirmed *denial* of certification of the class claims alleging fraudulent or misleading misrepresentations because an individualized

showing of "each class member's awareness and knowledge" was required. *Id.* at 735.[11] The only

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[11] Consistent with the result in *Lozano*, numerous other federal courts in the Ninth Circuit and elsewhere have rejected assertions that class certification is appropriate when the alleged fraudulent statements at issue were "uniform" or standardized. *See, e.g., McLaughlin*, 522 F.3d at 223 ("proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof"); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 659 (D. Nev. 2009) ("even if the 'Made it the USA' label was identical on all Ol' Roy packaging, the Court cannot conclude that without the geographic representation, the class members would not have purchased the product. . . . [A]ny number of differences exist between Ol' Roy products and other brands that could have caused class members to purchase Ol' Roy products. Because the reasons consumers purchased Ol' Roy over other brands likely vary greatly, the Court will not presume reliance"); *Pettrey v. Enter. Title Agency, Inc.*, 241 F.R.D. 268, 272, 279-80 (N.D. Ohio 2006) (denying certification despite standardized forms and rejecting argument that, because class members paid for services, they necessarily must have relied on misstatements); *Lichoff v. CSX Transp., Inc.*, 2004 U.S. Dist. LEXIS 21893, at *5, **16-18 (N.D. Ohio Oct. 6, 2004) (denying certification when alleged recruiting misrepresentations were uniform because plaintiffs' "decision to choose a certain career path is inherently a personal one, based on numerous factors, as is the decision to enroll in a certain school"); *Gartin*, 245 F.R.D. at 437-38 & n.6 (rejecting presumption of reliance notwithstanding uniformity of alleged misstatements in advertisements for dog food); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 210, 215 (N.D. Cal. 1994) (denying certification despite alleged misstatements in uniform advertising campaign for hearing aids because customers may have had different motivations for purchasing hearing aids); *Rosenstein v. CPC Int'l, Inc.*, 1991 WL 1783, at *4 (E.D. Pa. Jan. 8, 1991) (denying certification in consumer class action because of individual reliance issues even though "the advertisements

certified claim that was upheld by the Ninth Circuit pertained to the alleged unfairness of the representation. *Id.* at 736-37. In affirming certification of a class with respect to that single claim, the court did not even mention reliance, let alone hold that reliance could be presumed. [12]

Petitioner's suggestion that uniform misrepresentations could support a presumption of reliance in this case also cannot be squared with the undisputed fact that his fraud claims do not depend upon any alleged express misstatements by Sears. Thorogood admitted that he had no evidence that Sears expressly represented that the drums in the dryers at issue were 100% stainless steel. SA 222. Of equal importance, it also was undisputed that Sears did not expressly advertise that its stainless steel drum would prevent rust stains on clothes. Pet. 25a. Rather than relying on Sears' actual statements, Thorogood predicated his charges of fraud on the claimed inferences that "stainless steel" means "100% stainless steel," and that "100% stainless steel" means that the dryers "will never

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were uniform in their nature and broadly disseminated to the public"); *Soper v. Valone*, 110 F.R.D. 8, 9-10 (W.D.N.Y. 1985) (no predominance of common issues even though similar oral presentations were used to induce investment; court noted, *inter alia*, different levels of investor sophistication led to variations of reliance on statements).

[12] Even as to this claim, moreover, the Ninth Circuit affirmed class certification with reservations. *See id.* at 737 ("Though we might have decided the issue differently, our review is limited to assuring that the district court's determination has a basis in reason").

cause rust damage to clothes." As the court of appeals correctly recognized, the inferences Thorogood sought to draw from Sears' actual statements reconfirmed that individual hearings would be required to determine whether other class members "shared his understanding of Sears' representations." Pet. 26a. Indeed, any assessment of the merits of such inferences necessarily requires an individualized inquiry.

III. ADDITIONAL INFIRMITIES RENDER CLASS CERTIFICATION IN THIS CASE INAPPROPRIATE AND WEIGH HEAVILY AGAINST CERTIORARI

A further reason why this case is an altogether unsuitable candidate for certiorari is that class certification was unwarranted on a host of additional grounds. Given the multiple grounds ultimately requiring denial of class action status, there is no valid basis for this Court to address piecemeal, on an interlocutory appeal, the single basis for denial of class certification addressed in the petition.

As the record in this case makes clear class certification also was inappropriate because of numerous variations among the consumer fraud laws of the 29 jurisdictions invoked by petitioner, and other considerations precluding class treatment of the claims he asserted. *Cf. In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (instructing jury is "impossible" when "more than a few of the laws of

the fifty states differ").[13] Among numerous other differences, the laws of these 29 jurisdictions vary with respect to the requirements for proving reliance. Consistent with the general rule, several state courts that have considered the issue have ruled that reliance cannot appropriately be presumed in consumer fraud cases,[14] and federal

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[13] *See also In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing class certification because state consumer fraud laws "vary considerably"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (same point); *Castano*, 84 F.3d at 742-43 n.15 (rejecting class certification based, *inter alia*, on differences among the consumer fraud laws of the various states).

[14] *See, e.g., Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d. 240, 242 (N.Y. App. 2002) ("reliance may not be presumed where, as here, a host of individual factors could have influenced a class member's decision to purchase the product"); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 156-58 (Pa. Super. 2002) (holding that reliance could be presumed only where there was a fiduciary relationship between the parties); *Peltier Enterprises v. Hilton*, 51 S.W.3d 616 (Tex. App. 2000) (denying class certification of a fraud class action because, *inter alia*, of the "individualized proof" required to show "each individual plaintiff's reliance on that misrepresentation or concealment to his or her detriment"); *Millett v. Atl. Richfield*, 2000 WL 359979, at *12 (Me. Super. Mar. 2, 2000) (denying class certification of fraud claims on grounds, *inter alia*, of the need to prove reliance); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 234 (Md. 2000) (citing reliance requirement for proving fraud claims as reason to deny class certification, and noting: "Respondents, understandably, have cited no Maryland authority for their proposition that proof of reliance is excused"); *Humana, Inc. v. Castillo*, 728 So.2d 261, 265 (Fla. App. 1999) ("Florida law imposes a reliance requirement in an omissions case, which cannot be satisfied by assumptions . . . Florida law also requires a party asserting fraud to establish that but for the

courts applying the law of other of these 29 jurisdictions also have rejected arguments for a presumption of reliance in such cases.[15] State courts in yet more of these jurisdictions have concluded that reliance cannot properly be presumed when, as here, an assessment of each individual's understanding of the advertisements being challenged would be required,[16] while still others require a showing of a

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alleged misrepresentation or nondisclosure, the party would not have entered the transaction"); *Zarella v. Minnesota Mutual Life Ins. Co.*, 1999 WL 226223, at *8 (R.I. Super. Apr. 14, 1999) (agreeing "that class certification is generally not appropriate when individual reliance is at issue" in consumer fraud case, and finding "that individual issues of reliance undermine predominance"), *aff'd in relevant part, reversed in part on other grounds*, 824 A.2d 1249 (R.I. 2003); *see also In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221-22 (E.D. La. 1998) (noting that "the vast majority of states have never adopted a rule allowing reliance to be presumed in common law fraud cases, and some states have expressly rejected such a proposition").

15 *See, e.g., Blades v. Countrywide Home Loans, Inc.*, 2009 WL 903589, at *4 (S.D. Miss. Mar. 27, 2009) (because reasonable reliance was an element of fraud under Mississippi law, class could not meet predominance requirement); *Hum v. Dericks*, 162 F.R.D. 628, 630-40 (D. Haw. 1995) (finding that a product liability/fraud action concerning medical implants was not analogous to a securities action where reliance could be presumed; that class certification was less favored in the products liability context and that differing misrepresentations made class certification inappropriate); *Polich v. Burlington N., Inc.*, 116 F.R.D. 258, 261-62 (D. Mont. 1987) (refusing to certify class because individual issues would predominate, as each class member would have to separately prove elements of fraud despite common misrepresentations).

material inducement or misrepresentation,[17] or that the claimant's reliance was "justifiable."[18]

The 29 jurisdictions invoked by petitioner also differ with respect to what showing must be made regarding the intent of the party making the alleged misrepresentation. For example, some states (but not all) require a showing of intent as a prerequisite to recovery. *See* Tenn. Code Ann. §47-18-104(b)(9); Alaska Stat. §45.50.471(b)(8); N.H. Rev. Stat. Ann. §358-A:2(IX). In addition, some states (but not all) have provisions exempting retailers who disseminate in good faith information obtained from the manufacturer without actual knowledge of supposed misstatements. *See* Tenn. Code Ann. §47-18-111(a)(4); Fla. Stat. Ann. §501.207(1)(c).

These 29 jurisdictions also have varying statutes of limitations for fraud claims, which necessitate individualized inquiries unsuitable for class adjudication. *See, e.g., Fisher v. Bristol-Myers Squib Co.*, 181 F.R.D. 365, 372 (N.D. Ill. 1998) (denying certification in consumer fraud class action

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[16] *See, e.g., Agrella v. Ford Motor Co.*, 2006 WL 1493823, at *6 (Conn. Super. May 18, 2006) (denying class certification of fraud claims because proof of causation, *i.e.* that the deceptive advertisements actually caused each consumer in class to purchase vehicle, was required, and involved an individualized inquiry).

[17] *See, e.g., K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 802 (Wisc. 2007).

[18] *See, e.g., Toy v. Metro. Life Ins. Co.*, 863 A.2d 1, 11 (Pa. Super. 2004).

because of, *inter alia*, differing statutes of limitation among states); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974) (same).[19] Louisiana and Texas each bar claims not initiated within one year of the alleged injury. *See* La. Rev. Stat. Ann. §51:1409(E); Tenn. Code Ann. §47-18-110. Alaska, Kentucky, and Ohio bar any claims that are not filed within two years. Alaska Stat. §45.50.531(f); Ky. Rev. Stat. Ann. §367.170(1); Ohio Rev. Code Ann. §1345.10(C). New York bars claims filed more than three years from the accrual of the claim. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082 (N.Y. 2001). Massachusetts and Nebraska both have a four-year statute of limitations. *See* Mass. Gen. Laws. Ch. 260, §5A; Neb. Rev. Stat. §59-1612.

Petitioner also has failed to assert any injury that could be adjudicated on a classwide basis. Among other things, Thorogood did not even allege that every purchaser of Kenmore dryers sustained rust stains to their clothes as he allegedly did. *Cf. Sanchez v. Wal Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48428, at **5-7 (E.D. Cal. May 28, 2009) (denying certification in consumer fraud class for similar reasons); *see also* Pridgen, CONSUMER PROTECTION AND THE LAW §5:9 (Westlaw 2009) ("When a class action is being litigated, the problems of proving injury to all the class members may be even more problematic"). There is no merit to

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[19] Contrary to the district court's ruling (Pet.App. 5a-6a), statutes of limitation are considered "substantive." *See Jinks v. Richland Co.*, 538 U.S. 456, 465 (2003).

Thorogood's attempt to circumvent this defect by alleging a paid "premium" theory, *i.e.*, that purchasers of "stainless steel" dryers did not receive the full value of the purchase. Courts have rejected identical attempts to establish a common injury suitable for class determination. *See Sanchez*, 2009 U.S. Dist. LEXIS 48428, at **6-7; *accord McLaughlin*, 522 F.3d at 226 n.7 (noting that consumer transactions implicate a "degree of personal idiosyncratic choice"). More fundamentally, several of the 29 jurisdictions whose law Thorogood invoked (including his home state Tennessee) refuse to allow recovery even on an individual basis under a "premium" theory. *See, e.g., Rollins, Inc. v. Butland*, 951 So.2d 860, 873 (Fla. App. 2007); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001); *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 766 (Tenn. App. 2002).[20]

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[20] In addition, serious issues exist regarding petitioner's standing to assert consumer fraud claims on behalf of class members residing in certain states. Several of the relevant states extend their consumer protections only to residents or individuals injured while in the state. *See, e.g., Shaw v. Marriott Intern., Inc.*, 570 F. Supp.2d 78, 86-87 (D. D.C. 2008) (District of Columbia law); *Thomas v. Metropolitan Life Ins. Co.*, 540 F. Supp.2d 1212, 1225-27 (W.D. Okla. 2008) (New York law); *Baker v. Family Credit Counseling Corp.*, 440 F. Supp.2d 392, 413-14 (E.D. Pa. 2006) (Pennsylvania law); *Nepomoceno v. Knights of Columbus*, 1999 U.S. Dist. LEXIS 1366 at *43 (N.D. Ill. Feb. 1999) (Connecticut law); *Bass v. Hendrix*, 931 F. Supp. 523, 536 (S.D. Tex. 1996) (Texas law). Because Thorogood is a resident of Tennessee, and does not allege that he suffered any injury in these other states, he lacks standing to assert consumer fraud claims on behalf of residents of states that limit their consumer protection laws to their own residents. *See, e.g., Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974)

Given the numerous considerations confirming that class certification could not properly be granted in this case, there is no basis for this Court to review the Seventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 17, 2009

(nonresident plaintiffs lacked standing to serve as class representatives); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp.2d 1365, 1370-72 & n.5 (S.D. Fla. 2001) (same).